Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ACURA OF BELLEVUE, ET AL.

Petitioners,

v.

ROBERT B. REICH, SECRETARY OF THE DEPARTMENT OF LABOR; DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION; WILLIAM BUHL, ADMINISTRATOR OF THE DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, REGIONS 9 & 10; GORDON L. WILSON, DISTRICT DIRECTOR OF THE DEPARTMENT OF LABOR; UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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72 pp

QUESTIONS PRESENTED

1. Whether the courts below erred in holding that an optional appeal of agency action to an Administrative Law Judge renders the initial agency decision nonfinal for the purposes of judicial review under the Administrative Procedure Act.

2. Whether agency action issuing notices of violations of regulations and imposing civil monetary penalties is definitive agency action with direct impact on the parties and thus is ripe for judicial review.

PARTIES TO THE PROCEEDING

Petitioners (the "Auto Dealers"), plaintiffs-appellants below, include the following parties: BNS Enterprises d/b/a Acura of Bellevue; Alderwood Motors, Inc.; Art Gamblin Motors, Inc.; Evered Motors, Inc. d/b/a Bellevue Lincoln Mercury; Bellingham Chrysler Center, Inc.; Guinn Enterprises d/b/a BMW/Subaru of Bellevue; Bowen Scarff Ford Sales, Inc. d/b/a Bowen Scarff Ford/Volvo; Brewer Chrysler Plymouth, Inc.; Brien Motors, Inc.; Brooks Biddle Chevrolet Company; Burien Nissan, Inc.; Burien Toyota, Inc.; Capitol Management and Development Corporation d/b/a Capitol Coachman; Cornforth-Campbell Motors, Inc.; Dwayne Lane's Chrysler Plymouth, Inc.; Evergreen Sportscars, Inc. d/b/a Evergreen Mazda; Evergreen Ford; Fugate Ford, Inc.; Glen Grant Chevrolet, Inc.; Good Chevrolet, Inc.; Gubrud Motor Company d/b/a Gubrud Valley Nissan d/b/a Gordon Nissan; Harrington Chevrolet Geo, Inc.; Hinton's GM Nissan, Inc. d/b/a Hintons; JACKL, Inc. d/b/a Honda of Kirkland; Honda Auto Center of Bellevue; Huling Bros. Chrysler Plymouth, Inc.; Steve Klein, Inc. d/b/a Klein Honda; Lee Johnson Chevrolet, Inc.; WFB, Inc./Lexus of Seattle; Lynnwood Dodge, Inc.; Moceri's Puyallup Chrysler Plymouth, Inc.; North Seattle Chrysler; Performance Jeep Eagle, Inc.; Paso Robles Sales & Service, Inc. d/b/a Pontiac GMC Truck of Lynnwood; Prestige Ford,

Inc.; Rodland Toyota, Inc.; Leslie Fox, Inc. d/b/a Saturn of Bellevue; Leslie Fox, inc. d/b/a Saturn of Lynnwood; Sound Ford, Inc.; S&K Motors, Inc. d/b/a Sound Mazda, Sound Hyundai, Sound Suzuki and Buy Here Pay Here; The Seven Motors Corporation d/b/a Sound Subaru, Peugeot & Mitsubishi; Southgate Ford, Inc.; Tacoma Dodge, Inc.; Thomason Auto Group of Kirkland; Totem Hill Pontiac GMC Truck, Inc.; Hazelwood Management, Inc. d/b/a West Hills Honda; Brien Motors, Inc. d/b/a Winner Lincoln Mercury. No parent corporations or nonwholly owned subsidiaries exist.

The names of all respondents appear in the caption.

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 90 F.3d 1403 (1996) and is reprinted in Appendix A. The orders of the District Court for the Western District of Washington are attached chronologically as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 17, 1996. This Court has jurisdiction to review that judgment by a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

Section 10(c) of the Administrative Procedure Act ("APA") provides that otherwise final agency actions are subject to judicial review regardless of whether the aggrieved party has requested reconsideration:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section *whether or not there has been presented or determined an application for declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.*

5 U.S.C. § 704 (emphasis added).

STATEMENT OF THE CASE

A. Background and Department of Labor Assessments

The Auto Dealers are 49 different automobile dealerships in Western Washington, each of which employed young people, some of them 16 and 17 years of age, as lot attendants. The lot attendants' primary duties were to clean cars and the dealership premises. In addition, lot attendants moved automobiles within the Auto Dealers' premises, sometimes moved automobiles from one lot to another, sometimes drove to a nearby gas station for gas and, on infrequent occasions, ran errands or shuttled customers.

In March 1994, the Department of Labor ("DOL") issued notices of violation and assessments of civil monetary penalties against the Auto Dealers. The DOL determined the employment of minors as lot attendants violated Hazardous Occupation Order No. 2 ("HO No. 2"), 29 C.F.R. § 570.52, which prohibits minor employees' operation of motor vehicles on public roads except when "such operation is only occasional and incidental to the minor's employment."

In issuing the notices and assessments, the DOL made a definitive decision to interpret the "occasional and incidental" exemption to permit driving only in "emergency-

type situations or those which happen at rare intervals." On March 15, 1994, simultaneously with issuance of the notices of violation and assessments of monetary penalties, the DOL sent a letter to the National Automobile Dealers Association ("NADA")[1] stating:

> An activity which is 'occasional and incidental' is not determined as a percentage of the employee's time. Rather, the issue is whether the driving activity is a part of the minor's job duties. If a minor drove an automobile as a regular part of his/her job duties, we would consider that to be a violation of HO 2, regardless of the number of hours that the minor actually drove the vehicle.

According to its March 15, 1994, letter, the DOL found:

> The driving activity was neither infrequent nor performed only on an emergency basis. In most cases, the minors understood that driving was an expected part of their normal duties albeit not one of their predominant duties. In these cases, child labor violations have been charged as we do not consider this type of driving to be "occasional and incidental."

Appendix C, at App.42.

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[1]NADA is an association of approximately 20,000 franchise automobile dealers nationwide, including most, if not all, of the petitioners.

Thus, the DOL made a definitive statement of its interpretation of HO No. 2, concluding the exception for driving "occasional and incidental to the minor's employment" was limited to emergency or rare situations.

As a result of DOL's extremely narrow interpretation of its own rule and its assessment of violations and penalties on the Auto Dealers, the Auto Dealers have terminated or refused to hire anyone under the age of eighteen, eliminating over 1,000 jobs for young people in Western Washington State. Dealers throughout the nation have followed suit.

On April 1, 1994, the Auto Dealers timely filed administrative exceptions to the DOL action pursuant to 29 C.F.R. § 580.7. The Auto Dealers' exceptions should have commenced administrative proceedings. Pursuant to 29 C.F.R. § 580.10, the DOL was required "upon receipt of a timely exception" to immediately "refer the matter to the Chief Administrative Law Judge for a determination in an administrative proceeding." The DOL did not refer the matters to administrative proceedings as required. Instead, the DOL took no action whatsoever.

B. The District Court Proceedings

Left with no other avenue to contest the DOL's wrongful assessments, the Auto Dealers filed this action in the United States District Court for the Western District of

Washington on July 20, 1994, three and one half months after the DOL was asked to refer the Auto Dealers' exceptions to administrative proceedings. The Auto Dealers' action sought declaratory judgment and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 and claimed the right to immediate judicial review pursuant to the APA, 5 U.S.C. §§ 701-705. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1337(a).

Despite the Auto Dealers' lawsuit, the DOL still took no action to initiate administrative proceedings. On September 23, 1994, nearly six months late, the DOL finally mailed copies of an Order of Reference submitting the Auto Dealers' exceptions for administrative hearings. The next day, September 24, 1994, the DOL filed a Motion to Dismiss the Auto Dealers' District Court action. In its Motion, the DOL argued for dismissal based on lack of subject matter jurisdiction, ripeness, and failure to exhaust required administrative remedies.

The Auto Dealers opposed the DOL's motion, and on December 2, 1994, the District Court entered a Minute Order denying the DOL's motion. App. B. In the Order, the District Court determined that the DOL's regulations, 29 C.F.R. § 580 et. seq., did not require exhaustion of administrative remedies prior to judicial review, and,

therefore, the Auto Dealers' administrative exceptions did not preclude the court's review. App.17-19.

The DOL subsequently submitted a Motion for Reconsideration, arguing that administrative review was a requirement under 29 C.F.R. § 580 et. seq. The Auto Dealers again opposed the DOL's motion. On March 21, 1995, the District Court reversed its previous decision, granted reconsideration and dismissed the Auto Dealers' action. App. 20-40. The District Court's Order, however, was not based on any of the grounds offered by the DOL. Instead, the District Court reasoned that the DOL's otherwise final actions were rendered nonfinal once the Auto Dealers' filed optional exceptions to the DOL action, and thus were not subject to judicial review under the APA, 5 U.S.C. § 704. The Auto Dealers' subsequent motion for reconsideration was denied on April 6, 1995. App. 39-40.

C. The Ninth Circuit Proceedings

The Auto Dealers appealed the dismissal to the Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed, holding (1) the exercise of an optional appeal from an otherwise final agency action renders that action nonfinal for the purposes of judicial review under the APA; and (2) the action was not "ripe" for judicial review because the DOL had the opportunity to modify its decision following administrative reconsideration.

REASONS FOR GRANTING THE WRIT

Compelling reasons require Supreme Court review. The Ninth Circuit has decided an important federal question in a way which conflicts with the express language of the APA and Supreme Court precedent. A conflict among the Courts of Appeals concerning the effect of a request for administrative reconsideration on the availability of judicial review under the APA needs to be resolved. The issue has great importance for all parties aggrieved by agency action who desire judicial review.

I. THE NINTH CIRCUIT DECISION IS IN DIRECT CONFLICT WITH THE JUDICIAL REVIEW PROVISIONS OF THE APA.

The Ninth Circuit's interpretation of 5 U.S.C. § 704 flies in the face of the express language of the APA. The APA unambiguously states that agency action otherwise final remains final "*whether or not* there has been presented . . . any form of reconsideration." The statute itself could hardly be more clear that judicial review is not affected by an aggrieved party's optional request for reconsideration. Agency action is final and subject to judicial review even when, as in this case, there ***has*** been presented an optional appeal to superior agency authority. According to the plain language of 5 U.S.C. § 704, the Auto Dealers' exceptions to DOL's assessments did not render those assessments nonfinal for purposes of judicial review.

II. THE NINTH CIRCUIT DECISION IS IN DIRECT CONFLICT WITH SUPREME COURT PRECEDENT INTERPRETING THE APA.

This Court in Darby v. Cisneros, 509 U.S. 137, 125 L. Ed. 2d 113, 113 S. Ct. 2539 (1993), confirmed the plain language of 5 U.S.C. § 704:

> The last sentence of § 10(c) [5 U.S.C. § 704] refers explicitly to "any form of reconsideration" and "an appeal to superior agency authority." Congress clearly was concerned with making the exhaustion requirement unambiguous so that aggrieved parties would know precisely what administrative steps were required before judicial review would be available. If courts were able to impose additional exhaustion requirements beyond those provided by Congress or the agency, the last sentence of § 10(c) would make no sense. To adopt respondents' reading would transform § 10(c) from a provision designed to "'remove obstacles to judicial review of agency action,'" Bowen v. Massachusetts, 487 U.S. at 904, 108 S. Ct. at 2737, quoting Shaughnessy v. Pedreiro, 349 U.S. 48, 51, 75 S. Ct. 591, 593, 99 L. Ed. 868 (1955), into a trap for unwary litigants. Section 10(c) explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule; ***it would be inconsistent with the plain language of § 10(c) for courts to require litigants to exhaust optional appeals as well.***

Darby, 113 S. Ct. at 2544-45 (emphasis added). This last quoted sentence forbids the courts to require exhaustion of optional appeals prior to judicial review. That is exactly what the Ninth Circuit has done in this case.

As this Court predicted in Darby, the Ninth Circuit decision has created a "trap for unwary litigants." Darby, 113 S. Ct. at 2545. While the Ninth Circuit states that the Auto Dealers' pursuit of an optional intra-agency appeal makes judicial review unavailable, *the DOL maintains that no judicial review is available at all if an aggrieved party fails to file an administrative exception.* 29 C.F.R. § 580.4(c). Thus, an aggrieved party does not "know precisely what administrative steps were required before judicial review would be available." Darby, 113 S. Ct. at 2544.

The Ninth Circuit relied upon *dicta* in an earlier Supreme Court decision, ICC v. Locomotive Engineers, 482 U.S. 270, 96 L. Ed. 2d 222, 107 S. Ct. 2360 (1987). However, the portion of Locomotive Engineers upon which the Ninth Circuit relied was expressly disavowed in Darby. After quoting the *dicta* from Locomotive Engineers indicating petitions for reconsideration may render the agency action under reconsideration nonfinal, this Court in Darby recognized that the statement in Locomotive

Engineers was contrary to the express language of the APA:

> While some dicta in these cases [Locomotive Engineers and Bowen v. Massachusetts, 487 U.S. 879, 101 L. Ed. 2d 749, 108 S. Ct. 2722 (1988)] might be claimed to lend support to [respondents'] interpretation of § 10(c), the text of the APA leaves little doubt that petitioners are correct. Under § 10(a) of the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (emphasis added). Although §10(a) provides the general right to judicial review of agency actions under the APA, § 10(c) establishes when such review is available. ***When an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is "final for the purposes of this section" and therefore "subject to judicial review" under the first sentence.***

Darby, 113 S. Ct. at 2544 (emphasis added). Thus, this Court in its 1993 decision in Darby emphasized that the plain language of 5 U.S.C. § 704 would be honored despite previous *dicta* to the contrary in Locomotive Engineers.

The Ninth Circuit also claimed support from Stone v. INS, 115 S. Ct. 1537 (1995). The Ninth Circuit's reliance

on Stone is also misplaced. First, Stone involved the Hobbs Act and the Immigration and Naturalization Act ("INA"), not the APA. More importantly, Stone involved the issue of tolling and discussed the finality of agency action only as it related to tolling. Stone does not cite Darby, because it does not deal with the same issue.

This Court defined the issue in Stone as follows:

> We consider whether the filing of a timely motion for reconsideration of a decision by the Immigration and Naturalization Service's Board of Immigration Appeals tolls the running of the 90-day period for seeking judicial review of the decision.

Stone, 115 S. Ct. at 1541. The Court expressly noted that the issue was *not* whether requests for reconsideration render agency action nonfinal under the APA or the Hobbs Act:

> If the case turned on this theory, the question would arise whether an agency subject to either the APA or the Hobbs Act has the authority to specify whether the finality of its orders for purposes of judicial review is affected by the filing of a motion to reconsider. *The question is not presented here.* Both the Hobbs Act and the APA are congressional enactments, and Congress may alter or modify their application in the case of particular agencies. We conclude that in amending the INA Congress chose to depart from the ordinary judicial treatment of agency orders under reconsideration.

Stone, 115 S. Ct. at 1543 (emphasis added). Thus, the issue in Stone was one of tolling, not whether there was final agency action permitting judicial review.

The Court in Stone did recognize the relation between finality and tolling and looked to cases on finality for guidance. While the Court noted a general rule (citing Locomotive Engineers) that a request for reconsideration would render agency action nonfinal, the Court declined to follow that rule, and held that the agency action at issue *was final despite a motion for reconsideration.* The Court concluded:

> The consolidation provision in § 106(a)(6) [of the Immigration and Naturalization Act] reflects Congress' understanding that a deportation order is final, and reviewable, when issued. Its finality is not affected by the subsequent filing of a motion to reconsider. The order being final when issued, an alien has 90 days from that date to seek review.

Stone, 115 S. Ct. 1549. Thus, even Stone holds that the pursuit of optional administrative remedies does not render administrative action nonfinal.

III. THE COURTS OF APPEALS ARE DIVIDED IN APPLYING THE JUDICIAL REVIEW PROVISIONS OF THE APA.

Conflicting decisions in the Courts of Appeals indicate a confusion among the Circuits whether to follow

the express language of 5 U.S.C. § 704 and Darby or seemingly inconsistent statements in *dicta* in Locomotive Engineers and Stone.

In American Trucking Associations, Inc. v. Interstate Commerce Comm'n, 697 F.2d 1146 (1983), then Judge Scalia noted that the filing of an optional administrative appeal does not affect the availability of judicial review.

> The Administrative Procedure Act explicitly permits judicial appeal and request for agency reconsideration to be pursued simultaneously. 5 U.S.C. § 704 (1976).

American Trucking, 697 F.2d at 1148, fn. 1. Judge Scalia's conclusion appears inescapable under the explicit directive of 5 U.S.C. § 704.

However, subsequent decisions have the Courts of Appeals divided:

> Whether an agency order is final and thus reviewable in a court of appeals when a party has petitioned for agency reconsideration is a difficult question that has divided the courts of appeals. Compare *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371, 378-79 (7th Cir. 1986) (allowing simultaneous agency and court jurisdiction) and *American Trucking Associations, Inc. v. Interstate Commerce Comm'n*, 697 F.2d 1146 (1983) (same) with Winter v. ICC, 851 F.2d 1056, 1062 (8th Cir. 1988) (disallowing simultaneous jurisdiction). The language of 5 U.S.C. § 704 (1982), the relevant portion of the

Administrative Procedure Act ("APA"), seems on its face to permit such simultaneous jurisdiction, see infra.

West Penn Power Co. v. United States Environmental Protection Agency, 860 F.2d 581, 582-83 (3rd Cir. 1988). However, the court in West Penn went on hold that West Penn's filing with the agency of a request for reconsideration rendered the agency orders nonfinal for purposes of judicial review, relying on the same Locomotive Engineers *dicta* discussed above.

Consequently, parties aggrieved by agency action are left with cases from the Seventh and D.C. Circuits following the express language of 5 U.S.C. § 704 and the reasoning in Darby, while at least the Ninth Circuit, and likely the Third and Eighth Circuits, remain confused by the *dicta* in Locomotive Engineers. The issue begs for clarification from this Court.

IV. THE NINTH CIRCUIT'S ALTERNATIVE GROUNDS FOR ITS DECISION IS ALSO IN DIRECT CONFLICT WITH THE APA AND SUPREME COURT PRECEDENT.

The Ninth Circuit stated an alternative holding that this action is not "ripe" for judicial review. The court concluded that the Auto Dealers' request for administrative reconsideration not only rendered the agency action nonfinal, but also made it nonripe.

> Through this review process, the agency has the opportunity and authority to consider, change, and eventually finalize its position. Ruling at this time on whether the dealers violated Hazardous Occupation Order No. 2 or on the propriety of the penalty assessment would inappropriately interfere with the Department's intra-agency decision-making process before it is completed.

App. 14.

The Ninth Circuit's alternative holding on ripeness is nothing more than another way of saying the Auto Dealers' request for reconsideration rendered the DOL action nonfinal. This Court in Darby prohibited courts from imposing such requirements which do not appear in the APA:

> If courts were able to impose additional exhaustion requirements beyond those provided by Congress or the agency, the last sentence of § 10(c) would make no sense.

Darby, 113 S. Ct. at 2545. The alternative ripeness holding in this case, dependent as it is on the Auto Dealer's request for administrative reconsideration, is nothing more than a judicial exhaustion requirement in conflict with 5 U.S.C. § 704 and Darby.

Yet even if 5 U.S.C. § 704 and Darby did not eliminate the ripeness issue from consideration entirely, the DOL actions in this case are ripe for judicial review under

the traditional ripeness doctrine requirements. The question of ripeness is related to the question of finality. The ripeness issue was framed by this Court in Abbott Laboratories v. Gardner, 387 U.S. 136, 152, 87 S.Ct. 1507, 1517, 18 L.Ed.2d 681 (1967):

> [T]he ripeness doctrine . . . rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been **formalized** and its **effects felt in a concrete way** by the challenging parties.

Abbott Laboratories, supra, 87 S.Ct. at 1515, emphasis added. The Auto Dealers are not presenting an abstract disagreement, but an actual and tangible disagreement over the DOL's **formal** notices of violation and imposition of civil monetary penalties. Furthermore, the DOL's formal action, as well as its letters warning the National Automobile Dealer's Association, has been **felt in a concrete way** as discussed above -- namely, a change in the Auto Dealers' day-to-day business activities as evidenced by the termination of dozens of deserving employees.

The resolution of a ripeness issue traditionally requires a two-part inquiry: (1) determination of whether the issues tendered are fit for judicial resolution; and (2) assessment of the hardship to the parties if judicial relief is

denied at that stage. Abbott Laboratories, supra. The fitness criterion is essentially the question of finality -- has the agency made a definitive statement of its position? Abbott Laboratories, supra; Dietary Supplemental Coalition, Inc. v. Sullivan, 978 F.2d 560 (9th Cir. 1992).

Consistent with 5 U.S.C. § 704, agency action is traditionally "final" and reviewable when the agency completes its decision-making process and the result of that process is action that will directly affect the parties:

> To determine when an agency action is final, we have looked to, among other things, whether its impact "is sufficiently direct and immediate" and has a "direct effect on . . . day-to-day business." Abbott Laboratories v. Gardner, 387 U.S. 136, 152, 87 S.Ct. 1507, 1517, 18 L.Ed.2d 681 (1967). An agency action is not final if it is only "the ruling of a subordinate official," or "tentative." Id., at 151, 87 S.Ct. at 1517. ***The core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties.***

Franklin v. Massachusetts, 505 U.S. 788, 112 S. Ct. 2767, 2773, 120 L. Ed. 2d 636 (1992) (emphasis added).

In Abbott Laboratories, supra, this Court reviewed several factors in determining finality and ripeness of agency action for purposes of judicial review: (1) whether the challenged action is a definitive statement of the

agency's position; (2) whether the action has status of law with penalties for non-compliance; (3) whether impact on the plaintiff is direct and immediate; and (4) whether immediate compliance is expected. Abbott Laboratories, 87 S. Ct. at 1516-1517.

Even under the traditional analysis of Franklin and Abbott Laboratories, the DOL's assessments are clearly final and ripe. The assessments are the end result of a thorough process in which the DOL applied HO No. 2 in reliance on its July 1981 letter. The DOL conducted a far-reaching investigation of 49 Western Washington dealerships. The DOL formalized its determination in notices of violations and assessments of monetary penalties. The concluding paragraph of the DOL's March 15, 1994 letter to NADA confirms that the DOL expected immediate compliance:

> In discussing the child labor provisions with the violating employers, it was alleged that these violations may be prevalent in automobile dealerships throughout the country. Accordingly we would appreciate your assistance and cooperation to inform your member organizations of the child labor provisions ***so that we might prevent future violations***.

App. 43.

The direct effect of the assessments on the day-to-day business of the Auto Dealers is obvious. Not only did the Auto Dealers receive formal notices of violation and assessments of monetary penalties, but they were compelled to terminate minor employees by the DOL's letter threatening further penalties.

The second element of the ripeness inquiry, the hardship that will result if judicial review is denied, focuses on the effects of the challenged agency action. Hardship is present when the agency action in question has a "direct effect on the day-to-day business of" the complaining party. Abbott Laboratories, supra, 87 S.Ct. at 1517; Bankers Life and Casualty Co. v Calloway, 530 F.2d 625. The direct effects of the Department's Assessments on the Auto Dealers' day-to-day business has been duly noted above. The Auto Dealers were compelled to terminate minor employees, stop hiring minors, and/or restructure jobs. The fact the Auto Dealers have not yet paid the monetary penalties does not negate the substantial impact of the DOL's actions.

V. THE NINTH CIRCUIT DECISION PRESENTS AN IMPORTANT FEDERAL QUESTION OF FAR-REACHING SIGNIFICANCE.

In Darby, this Court recognized the importance of a consistent interpretation of 5 U.S.C. § 704:

> It perhaps is surprising that it has taken over 45 years since the passage of the APA for this Court definitively to address this question. Professor Davis noted in 1958 that § 10(c) had been almost completely ignored in judicial opinions, see 3 K. Davis, Administrative Law Treatise § 20.08, p. 101 (1958); he reiterated that observation 25 years later, noting that the "provision is relevant in hundreds of cases and is customarily overlooked." 4 K. Davis, Administrative Law Treatise § 26.12, pp. 468-469 (2d ed. 1983).

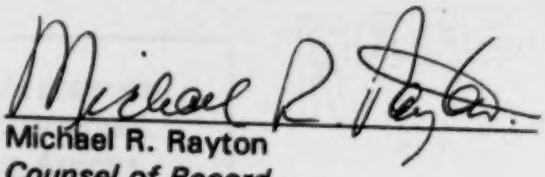
Darby, 113 S. Ct. at 2544. Although this Court professed to have "definitively" addressed this question in Darby, the Courts of Appeals, or at least the Ninth Circuit, is still relying on earlier precedents inconsistent with Darby and 5 U.S.C. § 704.

Every day, agencies take action affecting thousands of parties who need to know what action is necessary for judicial review. In Darby, this Court followed the express language of the APA and held that a request for optional administrative reconsideration does not affect the availability of judicial review. Nevertheless, the Courts of Appeals remain divided on the issue. This is an important issue requiring clarification from this Court.

CONCLUSION

The Auto Dealers present compelling reasons for review of the Ninth Circuit decision, and the petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 15th day of October, 1996.



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APPENDIX A **Corrected Reprint**

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Ryan, Swanson & Cleveland

ACURA OF BELLEVUE; ALDERWOOD MOTORS INC.; ALLEY CHEVROLET; ART GAMBLIN MOTORS; AURORA TOYOTA; BELLEVUE LINCOLN MERCURY; BELLINGHAM CHRYSLER CENTER; BMW/SUBARU OF BELLEVUE; BOWEN SCARFF FORD/ VOLVO; BREWER CHRYSLER PLYMOUTH; BRIEN MOTORS INC.; BROOKS BIDDLE CHEVROLET; BURIEN NISSAN; BURIEN TOYOTA INC.; CAPITOL COACHMAN; CORNFORTH— CAMPBELL MOTORS; DWAYNE LANE'S CHRYSLER PLYMOUTH; EVERGREEN SPORTSCARS INC. dba Everett Mazda; EVERGREEN FORD; FUGATE FORD MERCURY; GLEN GRANT CHEVROLET GEO MAZDA INC.; GOOD CHEVROLET; GUBRUD MOTOR CO. dba Gordon Nissan; HARRINGTON CHEVROLET GEO; HINTON CHEVROLET OLDS PONTIAC NISSAN dba Hintons; HONDA OF KIRKLAND; HONDA AUTO CENTER OF BELLEVUE; HULING BROS.; LEE JOHNSON CHEVROLET; LEXUS OF SEATTLE; LYNNWOOD DODGE; MOCERI'S PUYALLUP CHRYSLER PLYMOUTH INC.;

No. 95-35509

D.C. No. CV-94-1078-TSZ

OPINION

BEST AVAILABLE COPY

NORTH SEATTLE CHRYSLER; PERFORMANCE JEEP EAGLE; PONTIAC GMC TRUCK OF LYNNWOOD; PRESTIGE FORD; RODLAND TOYOTA; SATURN OF BELLEVUE; SATURN OF LYNNWOOD; SOUND FORD INC.; S&K MOTORS INC. dba Sound Mazda, Sound Hyundai, Sound Suzuki and Buy Here Pay Here; SEVEN MOTOR CORP. dba Sound Subaru Peugeot & Mitsubishi; SOUTHGATE FORD; TACOMA DODGE INC.; THOMASON FORD TOYOTA; WEST HILLS HONDA; WINNER LINCOLN MERCURY; TOTEM HILL PONTIAC GMC; KLEIN HONDA; GREY CHEVROLET INC.; PIONEER FORD INC.,

Plaintiffs-Appellants,

v.

ROBERT B. REICH, Secretary of the Dep't of Labor; DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION; WILLIAM BUHL, Administrator of the Dep't of Labor, Wage & Hour Division, Regions 9 & 10; GORDON L. WILSON, District Director of the Dep't of Labor; UNITED STATES OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
June 6, 1996—Seattle, Washington

Filed July 17, 1996

Before: James R. Browning and Thomas G. Nelson, Circuit Judges, and Fern M. Smith, District Judge.*

Opinion by Judge Smith

SUMMARY

Administrative Law/Judicial Review/Appeals

The court of appeals affirmed a district court dismissal of an action. The court held that exercise of an optional appeal from an agency administrator's decision renders the administrator's decision nonfinal for purposes of judicial review under the Administrative Procedures Act (APA).

Once an administrator of the appellee Department of Labor determines that there has been a violation of the child labor laws or of the regulations thereunder, the administrator is required to issue a notice to the employer setting forth, among other things, the amount of the penalty, the reasons for the penalty, and the employer's right to take exceptions to the penalties and request a hearing.

If exceptions are timely filed, the case is referred for assignment to an administrative law judge (ALJ) for a hearing. The ALJ's decision constitutes the final decision of the Department unless there is a timely appeal to the Secretary of Labor, in which case the Secretary's decision is the final deci-

*The Honorable Fern M. Smith, United States District Judge for the Northern District of California, sitting by designation.

sion of the Department. The collection of monetary penalties is not commenced until there is a final decision by the Department.

Appellants Acura of Bellevue and other car dealers employed sixteen and seventeen year old minors as lot attendants. After an investigation, a Department administrator issued a notice of assessment and civil money penalty to each of the dealers stating that the dealers had employed minors in a manner contrary to the child labor laws in that the dealers violated a hazardous occupation order which prohibited minor employees from operating motor vehicles on public roads except when such operation was only occasional and incidental to the minor's employment.

The notices identified the minors employed in violation of the law and assessed civil money penalties for each minor employed. The notices also advised that the dealers had the option of filing an "exception" to the administrator's decision, which would initiate a referral to an ALJ.

The dealers filed exceptions and were notified by the Department that the exceptions had been received and that they would be notified of a hearing date. Before the Department had assigned the case to an ALJ, the dealers sued the Secretary of Labor and others in federal court under the APA, challenging the administrator's finding that they violated child labor laws and the assessment of monetary penalties.

The Department assigned the case to an ALJ. The Department moved to dismiss the district court action for failure to exhaust administrative remedies, lack of finality in the agency action, and lack of ripeness. The court granted the motion on reconsideration, ruling that the filing of exceptions rendered the administrator's decision nonfinal for purposes of judicial review and that the court, therefore, lacked jurisdiction over the dealers' claims. The dealers appealed.

[1] The dealers exercise of the optional appeal to the ALJ rendered the initial administrator's decision nonfinal for purposes of judicial review under the APA. [2] Under Supreme Court authority, a motion for reconsideration renders an agency action nonfinal under the APA. There is no qualitative difference between a motion for reconsideration and an appeal to a superior agency authority for purposes of finality; the initial agency decision may be modified or reversed in both types of administrative review. An intra-agency appeal to an ALJ, who has *de novo* review of the Administrator's decision, rendered the Administrator's decision nonfinal under the APA.

[3] The dealers' action was not otherwise ripe for judicial review. [4] Whether an agency action is fit for judicial review depends on whether the agency action represents the final administrative work. [5] Ruling on the dealers' claims at this time would inappropriately interfere with the Department's intra-agency decision-making process before it was completed.

[6] A showing of financial hardship is insufficient to justify a finding of ripeness. Even if it were sufficient, the dealers had not yet paid the penalties as collection was stayed until the final Department decision. Speculation that the dealers would incur further monetary penalties if they did not change their employment practices, and if the ALJ or Secretary did not modify the Administrator's decision, was also insufficient to justify a finding of ripeness. Having chosen to invoke the agency appeals process, the dealers failed to provide sufficient justification for bypassing agency expertise and concurrently invoking the jurisdiction of the federal courts.

[7] This decision represented sound policy. Having two government bodies simultaneously review an agency action wastes scarce governmental resources. Further, simultaneous review poses the possibility of conflicting rulings. Allowing judicial review in the middle of an agency review process

unjustifiably interferes with the agency's right to consider and possibly change its position during the administrative proceedings. [8] The district court properly dismissed the complaint for lack of subject matter jurisdiction.

COUNSEL

Richard P. Lentini, Ryan, Swanson & Cleveland, Seattle, Washington, for the plaintiffs-appellants.

Jeffery Clair, United States Department of Justice, Washington, D.C., for the defendants-appellees.

OPINION

SMITH, Judge:

Plaintiffs/appellants appeal the district court's dismissal of their action for lack of subject matter jurisdiction. Appellants brought this action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-705, against the Secretary and other personnel of the Department of Labor (collectively, "Department") challenging both a Department Administrator's finding that appellants violated child labor laws and the consequential assessment of monetary penalties. We affirm.

FACTS

Plaintiffs/appellants are forty-nine car dealers in western Washington state ("dealers"). Each dealer employed sixteen and seventeen year old minors as lot attendants. According to the dealers, the lot attendants' primary duties were to clean cars and the dealership premises. Other duties, however, included moving cars on the dealers' premises, moving cars to different lots, driving to get gas, and transporting customers.

On March 18, 1994, after an investigation by the Wage and Hour Division of the Department of Labor, a Department Administrator issued a Notice of Assessments and Civil Money Penalty to each of the dealers ("the Administrator's decision"). The notices stated that the dealers had employed minors in a manner contrary to the child labor provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201-219 ("FLSA"). The dealers were found to have violated Hazardous Occupation Order No. 2, which prohibits minor employees from operating motor vehicles on public roads except when "such operation is only occasional and incidental to the minor's employment." 29 C.F.R. § 570.52. The notices identified the names of minors employed in violation of FLSA and assessed a civil monetary penalty of one thousand dollars for each seventeen year old and twelve hundred dollars for each sixteen year old employed in violation.

The notices also advised each dealer of its option to file an "exception" to the Administrator's decision, which would initiate a referral to an Administrative Law Judge ("ALJ") for hearing. The dealers timely filed exceptions on April 1, 1994. On April 7, 1994, the Department notified the dealers that their exceptions had been received and that they would be notified of a hearing date.

On July 20, 1994, before the Department had assigned the cases to an ALJ, the dealers filed the action below in federal district court against the Secretary of the Department of Labor and other agency personnel. The complaint sought judicial review under the APA and requested declaratory and injunctive relief from the Administrator's decision and the assessment of civil penalties. The complaint alleged that the decision was based on an arbitrary and capricious interpretation of the "occasional and incidental" language of Hazardous Occupation Order No. 2.

In September 1994, the Department referred the dealers' exceptions to an ALJ for administrative hearings. On Septem-

ber 20, 1994, the Department moved to dismiss the district court action for failure to exhaust administrative remedies, lack of finality in agency action, and lack of ripeness. Although initially ruling in favor of the dealers, the district court granted the Department's motion upon reconsideration. The district court rejected the Department's argument that the resolution of administrative appeals was a prerequisite to judicial review, but found, nonetheless, that the dealers' claims were not properly before it: "[P]laintiffs' filing of exceptions of the Administrator's decision rendered that decision *nonfinal* for purposes of judicial review, and thus the Court lacks jurisdiction over plaintiffs' claims." The dealers filed a Notice of Appeal on May 18, 1995, seeking review of the district court's dismissal.

LEGAL STANDARDS

I. *Standard of Review*

A district court's dismissal for lack of subject matter jurisdiction is reviewed *de novo*. *Dietary Supplemental Coalition, Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir. 1992), *cert. denied*, 508 U.S. 906 (1993).

II. *Statutory and Regulatory Framework: Oppressive Child Labor*

A. *Fair Labor Standards Act*

The Fair Labor Standards Act prohibits commerce involving oppressive child labor. 29 U.S.C. § 212. The FLSA defines "oppressive child labor" as hiring employees between the ages of sixteen and eighteen in any occupation that the Department of Labor "shall find and by order declare to be particularly hazardous." 29 U.S.C. § 203(l)(2). In Hazardous Occupation Order No. 2, the Secretary found and declared that "the occupation[ ] of motor-vehicle driver . . . on any public road [or] highway . . . [is] particularly hazardous for

the employment of minors between 16 and 18 years of age." 29 C. F. R. § 570.52(a). The regulation provides an exemption if the driving is restricted to daylight hours and is only "occasional and incidental to the minor's employment." 29 C.F.R. § 570.52(b)(1). Civil monetary penalties for violations of child labor laws or regulations may be imposed, not to exceed $10,000 per employee in violation. 29 U.S.C. § 216(e).

Title 29 U.S.C. § 216(e) also addresses the finality of a monetary penalty imposed at the initial administrative level:

> Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violation for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with [5 U.S.C. § 554], and regulations to be promulgated by the Secretary.

B. *Administrative Procedures*

Once an Administrator determines that there has been a violation of the child labor laws or of the regulations promulgated thereunder, he or she is required to issue a notice to the employer setting forth, *inter alia*, the amount of the penalty, the reasons for the penalty, and the aggrieved party's right to take exceptions to the penalties and request a hearing. 29 C.F.R. § 580.4.

The regulation defining "Finality of Notice" is contained in 29 C.F.R. § 580.5, which provides:

> If the person charged with violation does not, within 15 days after receipt of the notice, take exception to

> the determination that the violation or violations for which the penalty is imposed occurred, the administrative determination by the Administrator of the amount of such penalty shall be deemed final, and collection and recovery of the penalty shall be instituted . . . .

If exceptions are timely filed, the case is referred to the Chief Administrative Law Judge for assignment to an ALJ for hearing. At the hearing, the aggrieved party and the Department have the opportunity to present documentary and live evidence. *See* 29 C.F.R. § 580.7. The Department has the burden of establishing that its interpretation of the law is correct. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 247-48 (1980). The ALJ's decision may "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." 29 C.F.R. § 580.12(c).

The regulations provide that the ALJ's decision constitutes the final decision of the Department unless there is a timely appeal to the Secretary, in which case the Secretary's decision is the final decision of the Department. 29 C.F.R. §§ 580.12(e), 580.16.

The collection of monetary penalties is not commenced until there is a final decision by the Department:

> When the determination of the amount of any civil money penalty provided for in this part becomes final under § 580.5 in accordance with the administrative assessment thereof, or pursuant to the decision and order of an [ALJ] in an administrative proceeding as provided in § 580.12, or the decision of the Secretary pursuant to § 580.16, the amount of the penalty as thus determined is immediately due and payable to the U.S. Department of Labor.

29 C.F.R. § 580.18(a).

III. *Judicial Review of Agency Decisions*

The FLSA does not authorize or preclude judicial review of final agency decisions. The final decisions of the Department are therefore reviewable pursuant to Section 10(c) of the APA, which provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704.

DISCUSSION

I.

[1] We hold that exercise of an optional appeal to a Department ALJ renders the initial Administrator's decision nonfinal for purposes of judicial review under the APA.

The dealers argue that filing optional exceptions and a request for an ALJ hearing does not eviscerate or delay their right to judicial review of the Administrator's decision, relying primarily on the language of Section 10(c) of the APA and on *Darby v. Cisneros*, 509 U.S. 137 (1993). Their argument fails as a matter of law.

The language of Section 10(c) of the APA states: "[A]gency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for . . . any form of reconsideration . . . ." Although this language might appear to support the dealers' position, the Supreme Court has found otherwise. Addressing precisely this language, the Court stated:

> Th[is] language has long been construed by this and other courts merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review (unless, of course, specifically required to do so by statute . . .), but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal.

Interstate Commerce Comm'n v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 284-85 (1987). In *Stone v. Immigration and Naturalization Service*, 115 S. Ct. 1537 (1995), the Court cited the statutory interpretation as stated in *Locomotive Engineers* as the "longstanding construction of the APA language." *Stone*, 115 S. Ct. at 1542.[1]

[2] Under this Supreme Court authority, a motion for reconsideration renders an agency action nonfinal under Section 10(c) of the APA. *See also Bellsouth Corp. v. Federal Communications*, 17 F.3d 1487 (D.C. Cir. 1994) (holding that

[1]In *Stone*, the Court held that under the Immigration and Nationality Act ("INA"), a timely motion for reconsideration of a Board of Immigration Appeals decision does not toll the running of the statute of limitations for filing an appeal to federal court. The Court clarified that its ruling "depart[ed] from the ordinary judicial treatment of agency orders under reconsideration," because Congress intended the INA to be different from other judicial review statutes. 115 S. Ct. at 1543. The Court confirmed that a motion for reconsideration of an agency action under an ordinary judicial review statute, such as the APA, would render the action nonfinal and would toll the statute of limitations. *Id.* at 1542-43.

federal court has no jurisdiction to review agency action when motion for reconsideration is still pending before agency). There is no qualitative difference between a motion for reconsideration and an appeal to a superior agency authority for purposes of finality; the initial agency decision may be modified or reversed in both types of administrative review. It follows that an intra-agency appeal to an ALJ, who has *de novo* review of the Administrator's decision, must similarly render the Administrator's decision nonfinal under the APA.

The dealers' reliance on *Darby* is unavailing. *Darby* held that a person aggrieved by an agency decision is not required to exhaust nonmandatory administrative remedies, such as filing an optional appeal to a superior agency authority, before seeking judicial review. Because the dealers did file an administrative appeal before seeking judicial review,[2] however, *Darby* is inapposite.

II.

[3] The dealers' action is not otherwise ripe for judicial review. The Ninth Circuit uses two factors to determine whether a controversy is ripe for judicial review: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Dietary Supplemental Coalition, Inc. v. Sullivan*, 978 F.2d 560 (9th Cir. 1992) (applying factors set forth in *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967)), *cert. denied*, 508 U.S. 906 (1993).

A. *Fitness for Judicial Decision*

[4] Whether an agency action is fit for judicial review depends on whether the agency action represents the final

[2]Because the dealers did file an administrative appeal, the court is not required to decide whether filing an administrative appeal was required under the FLSA or under the Department's regulations promulgated thereunder.

administrative work; finality must be interpreted in a pragmatic and flexible manner to ensure that judicial review does not interfere with the agency's decision-making process. *Dietary Supplemental*, 978 F.2d at 562.

[5] The Administrator's decision was an interim determination that the dealers' employment of minor lot attendants violated child labor laws. The dealers' exceptions will be heard by an ALJ, who has *de novo* review. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 247-48 (1980). Through this review process, the agency has the opportunity and authority to consider, change, and eventually finalize its position. Ruling at this time on whether the dealers violated Hazardous Occupation Order No. 2 or on the propriety of the penalty assessment would inappropriately interfere with the Department's intra-agency decision-making process before it is completed.

B. *Hardship*

The dealers contend that immediate review is necessary because they have been assessed monetary penalties and have been "forced to terminate minor employees or otherwise modify their employment practices" to avoid risk of further penalties.

[6] A showing of financial hardship, however, is insufficient to justify a finding of ripeness. *Dietary Supplemental*, 978 F.2d at 562. Even if it were sufficient, the dealers have not yet paid the penalties, as collection is stayed pending a final decision by the ALJ or by the Secretary if the dealers appeal thereto. The penalties also may be reduced or revoked entirely on administrative appeal. Speculation that the dealers will incur further monetary penalties if they do not change their employment practices, and if the ALJ or Secretary does not modify the Administrator's decision, is also insufficient to justify a finding of ripeness. *See id.* at 564 (finding risk of additional product seizures to be too speculative to warrant judicial intervention absent final agency action). Nor is the

argument that minors will suffer hardship from lost job opportunities relevant; the ripeness inquiry focuses on whether delaying judicial review will impose hardships on plaintiffs, not on third parties. Having chosen to invoke the agency appeals process, the dealers have failed to provide sufficient justification for bypassing agency expertise and concurrently invoking the jurisdiction of the federal courts.

III.

[7] Our decision is sound policy. Having two government bodies simultaneously review an agency action wastes scarce governmental resources. *See Bellsouth Corp.*, 17 F.3d at 1489 ("Even a modicum of concern for judicial economy militates strongly against concurrent [agency and judicial review]."). Further, simultaneous review poses the possibility that an agency authority and a court would issue conflicting rulings. Allowing judicial review in the middle of the agency review process unjustifiably interferes with the agency's right to consider and possibly change its position during its administrative proceedings. *See Dietary Supplemental*, 978 F.2d at 563 (stating that courts should not deprive agency of opportunity to apply its expertise and to correct errors or modify positions in course of proceeding). An appeal to a higher agency authority may also obviate the need for judicial review. *See Outland v. Civil Aeronautics Bd.*, 284 F.2d 224, 227 (D.C. Cir. 1960) ("[W]hen the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary.").

[8] We conclude that the district court properly dismissed the dealers' complaint for lack of subject matter jurisdiction.

AFFIRMED.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ACURA OF BELLEVUE, et al., Plaintiffs, v. ROBERT REICH, SECRETARY OF LABOR, et al., Defendants.	NO. C94-1078Z MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, U.S. District Judge:

The Court hereby DENIES the defendants' motion to dismiss (docket no. 7). Where the Administrative Procedure Act applies, an appeal to superior agency authority is a prerequisite to judicial review only when (1) expressly required by statute, or (2) the agency rule requires appeal before judicial review, and the initial determination is made inoperative pending administrative review. Darby v. Cisneros, ___ U.S. ___, 113 S.Ct. 2539, 125 L.Ed. 2d 113, 127 (1993). Here, neither the statute nor the rules require an agency appeal prior to judicial review. Although the Administrator's initial assessment is held in abeyance upon the filing of exceptions, see 29 CFR §§ 580.5, 580.18(a), holding penalties in abeyance pending discretionary review "is insufficient under § 10(c) to mandate exhaustion prior to judicial review, for the agency also must require such exhaustion by rule." Darby, 125 L.Ed.2d at 121 n. 9 (emphasis added).

The Clerk of the Court is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 2nd day of December, 1994.

BRUCE RIFKIN, Clerk

By /s/_____
Casey Condon
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ACURA OF BELLEVUE, et al., Plaintiffs, v. ROBERT REICH, SECRETARY OF LABOR, et al., Defendants.	NO. C94-1078Z **MINUTE ORDER**

THIS MATTER comes before the Court on the defendants' motion for reconsideration of the Court's Minute Order denying their motion to dismiss (docket no. 20). The Court, having considered the defendants' motion

for reconsideration, the plaintiffs' response thereto, and the original motion papers, hereby GRANTS defendants' motion for reconsideration and DISMISSES this action.

Background

The plaintiff automobile dealers employed young people, some of them sixteen and seventeen years old, as lot attendants. On March 18, 1994, pursuant to investigations conducted by the Wage and Hour Division of the Department of Labor, the Department issued notices of determination to assess civil money penalties to each of the plaintiffs. The notices stated that the plaintiffs had employed minors in a manner contrary to the provisions of the Fair Labor Standards Act (FLSA). The dealers were found to have violated a regulation which restricts minors to operating motor vehicles only during daylight hours, provided the operation of the vehicles is "occasional and incidental to the minor's employment." 29 CFR § 570.52. The Secretary had determined that the minor employees' operation of vehicles was more than "occasional and incidental," within the meaning of the regulation, as interpreted by the Department. The determination notices notified each of the plaintiffs of the number of minors

employed in violation of the Act and advised the plaintiffs of their right to file exceptions. The plaintiff dealers filed timely exceptions to the assessments, and the cases were subsequently assigned to the Administrative Law Judge (ALJ) for review.

The automobile dealers filed this action against Robert B. Reich, the Secretary of the Department of Labor, and other federal defendants on July 20, 1994, after they had filed their exceptions to the assessments but before all the cases had been assigned to the ALJ. The Complaint, brought under the Administrative Procedure Act, 5 U.S.C. §§ 701-705, seeks declaratory and injunctive relief based on the Wage and Hour Division's arbitrary and capricious interpretation of the motor vehicle regulation and assessment of civil penalties against the plaintiffs.

On September 20, 1994, the defendants moved to dismiss this action on several grounds, most significantly failure to exhaust administrative remedies, lack of finality in agency action, and ripeness. Although several issues were raised, the Court focused on the issue of whether the plaintiffs were required to exhaust their administrative

remedies prior to seeking judicial review. On December 2, 1994, the Court entered the following Minute Order:

> The Court hereby DENIES the defendants' motion to dismiss (docket no. 7). Where the Administrative Procedure Act applies, an appeal to superior agency authority is a prerequisite to judicial review only when (1) expressly required by statute, or (2) the agency rule requires appeal before judicial review, and the initial determination is made inoperative pending administrative review. Darby v. Cisneros, ___ U.S. ___, 113 S.Ct. 2539, 125 L.Ed.2d 113, 127 (1993). Here, neither the statute nor the rules requires an agency appeal prior to judicial review. Although the Administrator's initial assessment is held in abeyance upon the filing of exceptions, see 29 CRF §§ 580.5, 580.18(a), holding penalties in abeyance pending discretionary review "is insufficient under § 10(c) to mandate exhaustion prior to judicial review, for the agency also must require such exhaustion by rule." Darby, 125 L.Ed.2d at 121 n. 9 (emphasis added).

The defendants have now moved for reconsideration, arguing that applicable DOL regulations require an agency appeal prior to court review. Because an agency appeal is mandatory, they argue, the test set out in

Darby is met, and exhaustion of administrative remedies is a prerequisite to judicial review.

In arguing that agency review is mandatory, the defendants rely on 29 CFR § 580.6, which provides in relevant part:

> (a) Any person desiring to take exception to the determination of penalty shall request an administrative hearing pursuant to this part.

(Emphasis added). Defendants also rely on the regulation specifying what information must be included in the Department's written notice of determination of violation. That regulation provides that the notice must state, among other things, that "in the absence of a timely exception to the determination of penalty . . . , the determination of the Administrator shall become final and unappealable." 29 CFR § 580.4(c) (emphasis added). These provisions, the defendants contend, make clear that administrative appeals are mandatory, and failure to seek administrative review makes the agency decision "unappealable" to higher agency authority or the courts.

Discussion

Section 10 (c) of the APA (5 U.S.C. § 704) provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704. In Darby, 113 S.Ct. 2539, 125 L.Ed.2d 113, 117-118, the Supreme Court interpreted this section to determine "whether federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the Administrative Procedure Act." After reviewing at length the legislative history of the APA and pre-APA case law,

the Court held that "where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." Id., 125 L.Ed.2d at 127 (emphasis in original). The Court added: "Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under § 10(c)." Id.

In reaching its decision, the Darby Court examined the last sentence of section 10(c) of the APA, 5 U.S.C. § 704 which provides:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented . . . an application for . . . any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative for an appeal to superior agency authority.

(Emphasis added). Noting that the statute refers explicitly to "any form of reconsideration" and an "appeal to superior agency authority," the Court stated that "Congress clearly

was concerned with making the exhaustion requirement unambiguous so that aggrieved parties would know precisely what administrative steps were required before judicial review would be available." Darby, 125 L.Ed.2d at 123 (emphasis added). The Court concluded that exhaustion requirements are limited to those expressly adopted by Congress and the agency. The Court explained that if courts were free to impose additional exhaustion requirements beyond those expressly provided by Congress or the agency, section 10(c) would be "transform[ed] . . . into a trap for unwary litigations." Id.

In Darby, a HUD regulation provided the aggrieved party with the option to seek review of the ALJ's decision, but neither the statute nor agency regulations required that he pursue administrative review. Because review by the Secretary was not expressly required by the statute or regulations, the court could not require the litigant to seek further administrative review before bringing a court action.

Where the statute or rule provides the aggrieved party with an option to seek further administrative review, as when the rule provides that the litigation "may" request review, the result under Darby is clear: exhaustion of

administrative appeals is not required. At the other end of the spectrum are regulations that specifically provide that judicial review can be obtained only after all administrative appeals have been exhausted. See Stock West Corp. v. Lujan, 982 F.2d 1389, 1393 (9th Cir. 1993) (25 CFR § 26(a) provides that "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department [of Interior], shall be considered final so as to constitute Departmental action subject to judicial review under [the APA]"); Ciba-Geigy Corp. v. Sidamon-Eristoff, 3 F.3d 40, 45 (2nd Cir. 1993) (EPA regulation, 40 CFR § 124.5(b), states that an "informal appeal" to Administrator "is, under 5 U.S.C.§ 704, a prerequisite to seeking judicial review"); Clouser v. Espy, 42 F.3d 1522, 1532 (9th Cir. 1994) (Forest Service regulation, 36 CFR § 251.101, specifically provides that exhaustion is required before an aggrieved party may seek federal court review). In these cases, it is clear based on the express language in the regulations that exhaustion is required.

The regulations at issue here fall somewhere between the clearly optional appeals at issue in Darby and those specifically required prior to judicial review. The

crucial issue is the effect of the "shall" language in § 580.6 ("Any party desiring to take exception to the determination of penalty shall request an administrative hearing pursuant to this part"). Clearly, under § 580.6, if an aggrieved party desires to appeal the Administrator's decision to an ALJ, he must file exceptions within 15 days and if he fails to file exceptions to the Administrator's decision, that decision becomes final and no further administrative review is permitted. That is not the same, however, as requiring exhaustion of administrative appeals prior to seeking judicial review.

The defendants also point to 29 CFR § 580.4(c), which requires the Department to include in their penalty notices a statement that failure to file a timely exception renders the Administrator's decision "final and unappealable." Again, that notice explains that the employer forfeits his right to administrative appeals if he fails to file timely exceptions, but it is not clear that the employer cannot seek judicial review of the Administrator's decision, which, under 29 CFR § 580.5, becomes "final" if

no exceptions are filed.[1] The DOL regulations here are devoid of any reference to judicial review, and for this reason it is unclear whether judicial review of an Administrator's decision is foreclosed to those who do not pursue administrative appeals.[2]

The Government argues that the "use of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made," citing Edmonds v. United States Department of Labor, 749 F.2d 1419, 1421 (9th Cir. 1984). The Court notes, however, that Edmonds was disapproved by the Supreme Court in

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[1]The Court notes that although the regulations require the notice to the employer to state that the decision becomes "final and unappealable," 29 CFR § 580.4(d), the specific provision dealing with the effect of failure to file exceptions, § 580.5, provides only that the decision of the Administrator shall be "deemed final" and the collection of penalties shall be instituted.

[2]In a recent district court case, Lockett v. Federal Emergency Management Agency, 836 F.Supp. 847, 852-853 (S.D. Fla. 1993), the court, quoting Darby, emphasized that the statute or rule must "clearly" mandate exhaustion before judicial review will be foreclosed. In that case, the court held that a statute providing that decisions regarding eligibility for assistance "may be appealed," and a related FEMA regulation giving occupants "the right to appeal," did not require exhaustion of administrative appeals prior to seeking judicial review.

Brock v. Pierce County, 476 U.S. 253, 106 S.Ct. 1834, 90 L.Ed.2d 248 (1986), and in a later Ninth Circuit case, Sierra Pacific Indus. v. Lyng, 866 F.2d 1099, 1112 (9th Cir. 1989), dealing with the effect of an agency's failure to act within a statutory deadline, the court acknowledged that "the thrust of Brock and Marshall [Marshall v. Local Union 1374, Int'l Ass'n of Machinists & Aerospace Workers, 558 F.2d 1354 (9th Cir. 1977)] is that 'shall' is not always mandatory unless Congress has specified a consequence." Whatever vitality remains in Edmonds, the Court is not persuaded that Edmonds is dispositive. In view of Darby's admonition that exhaustion requirements must be "clearly mandate[d]" and "expressly prescribed" so that the aggrieved party knows precisely what administrative steps are required prior to judicial review, the "shall" language in § 580.6 provides an insufficient basis on which to find that plaintiffs here must exhaust their administrative appeals prior to seeking relief in this Court.

Although the Court finds unpersuasive the Department's argument that the plaintiffs are required to exhaust their administrative remedies, the Court nevertheless concludes that the plaintiffs' claims are not

properly before this Court. Having reconsidered all the arguments made by the defendants in support of their motion to dismiss, the Court finds that the plaintiffs' filing of exceptions to the Administrator's decision rendered that decision nonfinal for purposes of judicial review, and thus the Court lacks jurisdiction over plaintiffs' claims.

The agency regulations at issue here provide that the Administrator's decision shall be deemed "final" only when no timely exceptions are filed. 29 CFR § 580.5. When timely exceptions are filed, the Administrator's decision is not deemed final and any penalties imposed are held in abeyance pending appeal. Because the decision of the Administrator is not "final" under agency regulations, it is not final for purposes of § 10(c) of the APA, and the Court lacks jurisdiction.

As stated earlier, the Darby Court held that "[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under 10(c)." Darby, 113 S.Ct. 2539, 125 L.Ed.2d 113, 127 (emphasis added). There is no question here that had the plaintiff dealers not filed exceptions to the assessments, the Department's action

would have been deemed "final" for purposes of § 10(c) [5 U.S.C. § 704]. See 29 CFR § 580.5. Because the plaintiffs chose to file exceptions, however, and seek review by the ALJ, the decision of the Administrator never became "final."

In Darby, the Court explained:

> [I]n ICC v. Locomotive Engineers, 482 US 270, 96 L Ed 2d 222, 107 S Ct 2360 (1987), we recognized that the plain language of § 10(c), which provides that an agency action is final "whether or not there has been presented or determined an application" for any form of reconsideration, could be read to suggest that the agency action is final regardless [of] whether a motion for reconsideration has been filed. We noted, however, that § 10(c) "has long been construed by this and other courts merely to relieve parties from the requirement of petitioning for rehearing before seeking judicial review (unless, of course, specifically required to do so by statute), . . . but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal."

Darby, 125 L.Ed.2d at 122 (second emphasis added). Following this reasoning, many courts have held that once

a party petitions the agency for reconsideration of a decision or order, that order is rendered nonfinal for purposes of judicial review. See Ogio v. I.N.S, 2 F.3d 959, 960 (9th Cir. 1993) (a filing of a motion to reopen or reconsider before the BIA renders the BIA's prior decision nonfinal for purposes of judicial review); Bellsouth Corp. v. F.C.C., 17 F.3d 1487, 1489 (D.C. Cir. 1994) ("a party that stays before an agency to seek reconsideration of an order cannot at the same time appear before a court to seek review of that same order, any more than the party could literally be in two places at the same time"). The Third Circuit, in West Penn Power Co. v. United States Environmental Protection Agency, 860 F.2d 581, 586 (3rd Cir. 1988), a case involving a petition from the order of the Interstate Commerce Commission, explained:

> Petitioners have the option of proceeding directly to the court of appeals, or giving the agency another chance to consider the matter and applying to the court of appeals afterward. We can see no justification for allowing a petitioner to apply to bother the court and the agency at the same time. On the contrary, such a regime could lead only to a waste of resources on the part of the agency, or the court, or both, without any countervailing benefit.

(Emphasis added).

Here, the plaintiffs did not file a motion for reconsideration, but rather an application for review by an ALJ. In this Court's view, there is no qualitative difference between the two types of administrative review, at least in the context of this case, and the principle of "nonfinality" should apply to both.

In the original briefs, the parties focused on the requirements for finality" set forth in Ukiah Valley Medical Center v. FTC, 911 F.2d 261, 264 (9th Cir. 1990):

> The general rule is that administrative orders are not final and reviewable "unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." When an action is not a "definite" statement of the [agency's] position and does not have a "direct and immediate . . . effect on the day-to-day business" of the subject party, it is not "final." Other relevant factors include whether the order has the status of law or comparable legal force, and whether immediate compliance with its terms is expected.

(Internal citations omitted). The Court concludes that even under this test, the Administrator's decision cannot be deemed "final."

The plaintiffs argue that the initial decision of the Administrator had a direct and immediate impact on their day-to-day business because they can no longer use sixteen and seventeen-year-old workers to perform certain work. As a result, they argue, they have had to change the way they run their businesses and have had to deny employment opportunities to students in need of work. Although the plaintiffs may have changed the way they do business to avoid the risk of further penalties, this fact along provides an insufficient basis for finding the agency's action to be "final."

In determining finality, the Court must also look at whether the agency's decision "impose[d] a legal obligation . . . or fix[ed] some legal relationship as a consummation of the administrative process," that is, whether the action is a "definitive" statement of the agency's position, as well as whether the order has the status of law or comparable legal force, and whether immediate compliance with its terms is expected. Id. (emphasis added). Here, both the statute

and the regulations provide that if timely exceptions are filed, the Administrator's determination will not be deemed final, and the final determination of the penalty will be made by an ALJ after a hearing. See 29 U.S.C. § 216(e) (where the charged party takes exception to a penalty, a "final determination of the penalty shall be made in an administrative proceeding after opportunity for a hearing"); 29 CFR § 580.5 (if a person charged with a violation does not take exception to the violation for which the penalty is imposed within 15 days, the administrative determination shall be deemed final). In addition, once exceptions are filed, the collection and recovery of penalties is suspended pending a final decision by the ALJ, or by the Secretary if an appeal is taken from the ALJ's decision. 29 CFR § 580.19. Because the decision of the Administrator is deemed nonfinal upon the filing of exceptions, it cannot be said that the Administrator's decision represents the "definitive" position of the agency or that an obligation has been imposed as a "consummation" of the administrative process. Moreover, because the penalties imposed on the employer are uncollectible and unenforceable during the period of appeal, there is no basis for finding that the

Administrator's order has the status of law or comparable legal force, and that immediate compliance with its terms is expected. Given the absence of these factors, there is an insufficient basis for finding that the Administrator's decision is final for purposes of judicial review. Accordingly, the Court GRANTS the defendants' motion to dismiss.

IT IS SO ORDERED.

The Clerk of the Court is directed to send uncertified copies of this order to all counsel of record.

DATED this 20th day of March, 1995.

/s/
THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ACURA OF BELLEVUE, et al., Plaintiffs, v. ROBERT REICH, SECRETARY OF LABOR, et al., Defendants.	NO. C94-1078Z **MINUTE ORDER**

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, U.S. District Judge:

The Court hereby DENIES plaintiffs' motion for reconsideration.

The Clerk of the Court is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 6th day of April, 1995.

BRUCE RIFKIN, Clerk

By /s/_____
Casey Condon
Deputy Clerk

APPENDIX C

U.S. Department of Labor

Employment Standard Administration
Wage and Hour Division
Washington, D.C. 20210

March 15, 1994

Mr. Richard Malaise
Director
National Automobile Dealers
Association
8400 Westpark Drive
McClean, Virginia 22102

Dear Mr. Malaise:

I am writing to enlist your assistance in advising your State-level organizations and individual members about the child labor provisions of the Fair Labor Standards Act (FLSA). Recent Wage and Hour Division investigations indicate that some automobile dealers may not be aware that minors under 18 years old are not permitted to drive motor vehicles as a part of their job duties.

Enclosed for your information are several publications that outline the child labor provisions of the FLSA, Of particular relevance is Hazardous Occupation Order No. 2 (HO 2) which prohibits minors under the age of 18 from driving a motor vehicle on any road or highway as part of their job. Although HO 2 does contain an exception that would allow

minors under certain conditions to perform some occasional and incidental driving, recent investigations have disclosed that what constitutes "occasional and incidental" driving may not be clearly understood by auto dealerships.

An activity which is "occasional and incidental" is not determined as a percentage of the employee's time. Rather, the issue is whether the driving activity is a part of the minor's job duties. If a minor drove an automobile as a regular part of his/her job duties, we would consider that to be a violation of HO 2 regardless of the number of hours that the minor actually drove the vehicle.

Recent investigations of auto dealerships have disclosed HO 2 violations because, as part of their normal job duties, minors have been asked to ferry cars between lots, drop-off and pick-up customers, pick-up parts, or otherwise drive automobiles on public roads. In most instances, we found that these activities were performed on a regular and recurring basis. The driving activity was neither infrequent nor performed only on an emergency basis. In most cases, the minors understood that driving was an expected part of their normal duties albeit not one of the predominant duties. In these cases child labor violations have been charged as we do not consider this type of driving to be "occasional and incidental."

In discussing the child labor provisions with the violating employers, it was alleged that these violations may be prevalent in automobile dealerships throughout the country. Accordingly we would appreciate your assistance and cooperation to inform your member organizations of the child labor provisions so that we might prevent future violations. We would be pleased to work with you to publish this information in your organization's newsletter or through other such means. If you have any questions or if we can be of any assistance in this endeavor, please contact Nila Stovall at 202-219-7640.

Thank you for your cooperation in this important education effort.

Sincerely,

/s/
Maria Echaveste
Administrator